

NO WARRANT FOR RADICAL CHANGE: A RESPONSE TO PROFESSORS GEORGE AND GUTHRIE

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INTRODUCTION

Professors George and Guthrie have written a provocative article proposing radical changes to the Supreme Court.¹ They propose increasing the size of the Supreme Court from nine to fifteen Justices to increase the Court's capacity. Of course, there is nothing sacrosanct about nine as the number of Justices. The size of the Court has varied from five to ten Justices over the course of American history. But there have been nine Justices ever since 1869, and a change after almost 150 years is would appear quite dramatic.²

Even more significantly, Professors George and Guthrie propose having the Supreme Court hear cases in panels with the opportunity for en banc review in extraordinary cases. This would be unprecedented in the United States. There occasionally have been proposals for this type of change, but not for a long time and not with any serious chance of adoption.³

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1. Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439 (2009).

2. Also, the intense controversy over the last effort to change the size of the Supreme Court—President Roosevelt's Court-packing plan in the 1930s—likely has discouraged consideration of changing the size of the Supreme Court. For a discussion of Roosevelt's proposal and the controversy surrounding it, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 255–56 (3d ed. 2006).

3. Professors George and Guthrie mention that this was proposed in 1869 and 1880. George & Guthrie, *supra* note 1, at 1460. There is no indication that in either instance this had a serious chance of adoption.

Professors George and Guthrie are correct in their premise that it is always desirable to rethink institutional design and that the Supreme Court largely has been immune from this type of scrutiny.⁴ Yet change—and especially radical change—requires a compelling justification, a belief that no less drastic alternative would suffice, and a conviction that the reform would be desirable. I do not believe that Professors George and Guthrie’s proposal meets these requirements.

In this Response, I thus address three questions in evaluating their proposal. First, have Professors George and Guthrie shown a problem that requires a solution? Second, if so, are there other ways to solve this problem that are less drastic? Third, would such a change be desirable? Finally, I conclude by offering some cautionary thoughts about empirical studies of judging behavior, especially when mere statistical descriptions form the basis for unjustified normative conclusions.

I. IS THERE A PROBLEM?

The premise for the proposal by Professors George and Guthrie is that the Supreme Court’s docket has shrunk dramatically. They are correct both in terms of the actual number of cases decided—235 in 1930, 170 in 1945, 161 in 1985, and 67 in 2007—and in the percentage of petitions for certiorari that are granted.⁵ The harder question is assessing how much this is a problem.

From the perspective of a lawyer who has had a number of seemingly meritorious petitions for certiorari denied, I find the decreased docket troubling. It is, by any measure, a great deal more difficult to get the Court to hear a case, even a case with a circuit split. From the perspective of a casebook author who has to prepare annual supplements,⁶ the longer opinions that have resulted from the smaller docket are very problematic. As the number of cases has gone down, the length of the opinions has gone up. Slip opinions are often over

4. A notable exception to this is a 2006 proposal to limit the terms of Supreme Court Justices. *See generally* REFORMING THE COURT (Roger C. Cramton & Paul D. Carrington eds., 2006) (debating the desirability of tenure reform for Supreme Court Justices and exploring strategies to achieve term limits).

5. George & Guthrie, *supra* note 1, at 1441.

6. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (2d ed. 2005); ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE (2008).

150 pages long.⁷ There is no way to edit an opinion that long into an assignment manageable for students in one night without making a hash of it. I have come to favor word and page limits being imposed on Supreme Court opinions.

On the other hand, as I talk to judges and lawyers who practice in specialized areas, like bankruptcy and tax law, I hear praise for the smaller docket. From their perspective, the fewer Supreme Court decisions in their field the better, as the Court lacks expertise in these areas and its rulings are often perceived as engendering more confusion than clarity.

My instinct is the same as Professors George and Guthrie's that a larger docket would be desirable. But it is impossible to assess whether the smaller docket poses serious problems or how large a docket would be needed to make a difference. The impossibility of knowing how many more cases the Court would hear if it sat in panels as opposed to always being en banc complicates this assessment. In fact, Professors George and Guthrie emphasize that they are saying only that their proposal "could" increase the size of the docket, not that it would.⁸

Professors George and Guthrie offer three primary advantages to their proposal and consequentially to a larger docket. First, they argue that the larger docket that would result from the Court acting in panels would decrease the conflicts among the federal circuits and the states. As they note, a primary function of Supreme Court review is to resolve these disagreements and thus to create uniform federal law.⁹

This justification falls short because Professors George and Guthrie provide no basis for assessing whether the size of the docket is a serious problem in terms of the splits that exist in the lower courts. They offer no information as to the number of conflicts in decisions that exist, how long they last, or the extent to which their

7. For example, the slip opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, No. 05-908 (U.S. June 28, 2007), was 176 pages long, not counting the appendices.

8. Professors George and Guthrie write, "We intentionally say 'could' rather than 'would' First, the Court's docket is almost entirely plenary, and the Justices therefore would not be required to hear more cases than they currently hear. The dynamics of the certiorari process would influence the decision." George & Guthrie, *supra* note 1, at 1460 n.94.

9. Supreme Court Rule 10(a) identifies a split among the lower courts as a ground for granting certiorari.

proposal would decrease conflicts. They are correct that conflicts in the interpretation of federal law are undesirable, but neither they nor any of the sources they cite provide any indication of the extent of the problem or how much using panels of Justices would solve this.¹⁰ Nor is it easy to measure the number of circuit splits or their duration. There is actually nothing but intuition that the problem has increased over time or that a larger docket would make much of a difference. The Court's reasons for choosing to not take more cases presenting a split are complex, and the Court might continue to refuse to do so even if it had the capacity for a larger docket.

Second, Professors George and Guthrie argue that increasing the size of the Supreme Court's docket would lead to more error correction. They write: "[I]f the Court decided more cases, it would undoubtedly correct more errors committed by lower courts."¹¹

But to speak of "errors" is to beg enormously difficult questions of how to assess what is "correct" as opposed to "erroneous." Just because the Supreme Court reverses a federal court of appeals or a state's highest court does not mean that the Supreme Court is right and the lower court is wrong. In the 2006 Term, twenty-four of the sixty-eight cases decided by the Supreme Court were resolved by a 5–4 margin. It surely cannot be said that the five in the majority were correct whereas the four dissenters were in error. Even if the Supreme Court is unanimous in reversing a lower court, it does not mean that the lower court decision was erroneous. Unless one simply assumes that the Supreme Court is always right, it is impossible to believe that more decisions means more error correction.

Moreover, even if one began with such an untenable assumption, increasing the size of the docket through using panels would not provide much more in the way of error correction. Professors George and Guthrie acknowledge this when they write,

We of course are not asserting that the Supreme Court's primary function is as a court of error correction. A single institution, even with panels, could not correct error in the more than 30,000 cases

10. Professors George and Guthrie discuss this at George & Guthrie, *supra* note 1, at 1448–49. None of the sources in the footnotes on those pages discuss this.

11. *Id.* at 1447.

decided on the merits by the federal courts of appeals and the many more issued by state high courts.¹²

Third, Professors George and Guthrie argue that the larger Supreme Court docket would increase “checks and balances.”¹³ They point to more than two thousand federal laws and almost a half million pages in the Federal Register during the Bush presidency.¹⁴ They say that “[i]f the Court’s decisionmaking capacities expanded, it could play a much more prominent role in policing the actions of the other branches.”¹⁵

But here Professors George and Guthrie assume that federal judicial review requires Supreme Court review. Even though the Supreme Court may hear relatively few cases, the lower federal courts are available to hear challenges to federal statutes or regulations and to decide any cases that pose questions of interpretation or validity. The number of federal laws and regulations says nothing about the need for Supreme Court review. Professors George and Guthrie offer no examples or evidence that the smaller docket is limiting the adequacy of checks and balances.

The overall problem with Professor George and Guthrie’s argument is that they fail to present any way for assessing what is the ideal size of the Supreme Court’s docket. They have the intuition that a larger docket would be better, but offer neither a way to assess this claim nor any way for determining what the docket ideally should be. Without this analysis, it is simply impossible to determine whether having the Court sit in panels, and the increase in the docket that would result from it, is desirable.

II. ARE THERE LESS DRASTIC ALTERNATIVES?

By any measure, Professors George and Guthrie argue for dramatic changes in the Supreme Court’s institutional structure: the first change in its size in nearly 150 years, making it two-thirds larger, and having it sit in panels for the first time in American history. Thus, it is reasonable to ask whether there are other, less radical ways to achieve the goal of increasing the size of the docket.

12. *Id.* at 1447 n.38.

13. *Id.* at 1451–52.

14. *Id.*

15. *Id.* at 1452.

There are many other ways to increase the number of cases decided by the Supreme Court each year. First, the Court can simply choose, on its own, to hear more cases. There has been a great deal of discussion in recent years about the Court's shrinking docket, and perhaps not coincidentally this year the Court has taken more cases. It is likely that there will be about eighty-five cases during October Term 2008, a third more than the sixty-seven cases decided the year before. Some Justices have said that they believe that a larger docket would be desirable.¹⁶ The Court can easily solve the problem of the dwindling docket by taking more cases each year.

Second, Congress can expand the mandatory jurisdiction of the Supreme Court by statute. At the beginning of American history, the Supreme Court's docket was entirely mandatory. Over the course of American history, Congress has made even more of the Court's docket discretionary.¹⁷ The most recent change occurred in 1988, when Congress made the Court's entire appellate jurisdiction discretionary except for review of decisions by three-judge federal district courts. The decrease in the size of the docket is, in part, because of the elimination of almost all mandatory jurisdiction in the Supreme Court.

Congress could remedy this by mandating that the Supreme Court hear appeals in certain kinds of cases. Professors George and Guthrie suggest one possible way to achieve this: increase the use of certification of cases to the Supreme Court.¹⁸ Professors George and Guthrie suggest that the Supreme Court take more certified cases. Congress could create mandatory jurisdiction in these cases. The desirability of this is uncertain. Courts of appeals have no way of assessing the relative priority of cases on the Supreme Court's docket or what case is the better vehicle for addressing a particular issue. My point is not to argue for greater mandatory jurisdiction, but rather, to suggest that it is a much less drastic way to increase the Court's docket than having it decide cases in panels.

16. Professors George and Guthrie point out that Chief Justice Roberts said exactly this at his confirmation hearings. *Id.* at 1447. I also have heard Justices Breyer and Alito say this in comments at judicial conferences.

17. For a description of these changes, see ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 672–73 (5th ed. 2007).

18. George & Guthrie, *supra* note 1, at 1450–51.

Third, other institutional structures could be developed to resolve splits among the circuits. In the 1970s, there were proposals for creating a new national court of appeals between the United States Supreme Court and the federal courts of appeals.¹⁹ The primary justification offered for these proposals was to decrease unresolved splits among the circuits.²⁰ This proposal, too, would be quite dramatic in establishing a new court and a new level of court, but because it would leave the Supreme Court untouched, it would not be perceived by the public or most lawyers as nearly as radical a change as that proposed by Professors George and Guthrie.²¹

These suggestions are not exhaustive of the ways that the Court's docket might be expanded. But they do indicate that there are many ways to achieve the goal without expanding the Court or having it sit in panels.

III. WOULD THE PROPOSAL BY PROFESSORS GEORGE AND GUTHRIE BE DESIRABLE?

Even assuming that their proposal would achieve the benefits they identify, it still may carry significant, detrimental consequences. I have no sense as to whether fifteen rather than nine Justices would be better. As Professors George and Guthrie acknowledge, the number of Justices is inherently an arbitrary choice. They acknowledge, "We do not know how to calculate an 'optimal' number of Supreme Court Justices"²²

From the perspective of a lawyer who has argued several cases in the Supreme Court, I confess to worrying about what it would be like to face a bench of fifteen rather than nine. But I also know no way of

19. See, e.g., Comm'n on Revision of the Fed. Court Appellate Sys., *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 208–47 (1975).

20. CHEMERINSKY, *supra* note 17, at 680–81.

21. The proposals for a new national court of appeals were tremendously controversial, and sitting and former Supreme Court Justices spoke out against them. See, e.g., *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill Advised,"* 59 A.B.A. J. 835, 836–38 (1973) (defending the screening function of the Supreme Court as its most important function and an essential feature of the Court); Earl Warren, *Let's Not Weaken the Supreme Court*, 60 A.B.A. J. 677, 678–80 (1974) (arguing that a delegation of the Supreme Court's powers would weaken the Court, politicize the judiciary, and actually add to the Court's workload).

22. George & Guthrie, *supra* note 1, at 1456.

determining whether fifteen Justices would be overall better or worse than nine.

I, however, believe, however, that having the Supreme Court sit in panels rather than en banc would be very undesirable. A decision of a panel of Supreme Court Justices never will have the same legitimacy as a decision by the whole Court. Losing litigants and the public always will be left to wonder whether the result would have been different if only the luck of the draw had produced a different panel to hear the case.

When I hear of a person arguing a case in a federal court of appeals, my first question always is, “Who is your panel?” When I argue a case in a federal court of appeals that reveals the panel’s composition in advance—the Ninth Circuit announces the panel a week before oral argument—I learn the identity of my panel as soon as I can. When I argue a case in a federal court of appeals that does not announce the panel until the day of the argument, like the Fourth Circuit, the first thing I do upon arriving at the court house is rush to the clerk’s office and learn my panel. This, is common behavior among appellate lawyers.

I, and everyone, make judgments about the likely outcome based on the identity of the panel. Rarely has my prediction ever been wrong. In the summer of 2008, I argued a civil rights case in the Ninth Circuit that involved the death of three Latino teenagers as a result of a police officer mistakenly shooting at a moving car. I knew that I had little chance of winning when I saw that my panel was three very conservative judges. A friend who is a very experienced attorney, upon hearing of the panel, suggested that I let my ten-year-old daughter argue the case; that her chance of prevailing was no less than mine. After the oral argument, which went poorly, I told my friend that I should have let my daughter argue; the argument could not have gone worse for my side, she had a better chance of charming them, and when they were mean, she could have gotten away with kicking them in their shins. (I lost two weeks later in a two-page unpublished opinion.)

I do not think that it would be desirable to have outcomes in the Supreme Court depend on the identity of the panel or be perceived as being a result of the luck of the draw. This inherently would lessen

the legitimacy and credibility of Supreme Court decisions.²³ Professors George and Guthrie respond to this by arguing that in only a small percentage of cases would the outcome be different with panels.²⁴ First, in the cases that are 5–4—and remember that in October Term 2006 of sixty-eight cases, twenty-four were decided by a 5–4 margin²⁵—the outcome really would depend on the accident of the panel. Second, and more importantly, lawyers and the public would understandably perceive that the result was the product of who was selected for the panel. Statistics showing that overall most cases would likely have come out the same with the full Court never would eliminate the sense in many cases that the result was the product of the panel.

The panel's decision would not have the same authority or legitimacy as decisions by the entire Court. The loss of legitimacy would be greatest at the beginning as lower courts, lawyers, academics, and the public became accustomed to panel decisions. But the loss of legitimacy would not simply be short-term; panel decisions never would have the credibility or legitimacy of decisions of the full Court.

Professors George and Guthrie address this problem briefly at the end of their article.²⁶ They assert that legitimacy is not a problem because the courts of appeals and foreign courts have legitimacy even though they sit in panels.²⁷ But the problem with this argument is that it treats legitimacy as binary, as either existing or not existing. Of course, that is not correct. Legitimacy, however defined and measured, is surely a continuum. The relevant question is whether courts that sit in panels have the same legitimacy as courts that sit en banc. Put more precisely, the issue is whether sitting in panels would substantially decrease the Court's legitimacy. Asserting that courts of appeals and foreign courts have legitimacy does not answer that

23. Many have written about the importance of the Court's credibility and institutional legitimacy. *See generally, e.g.*, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986) (arguing that the Supreme Court's prudential values serve as limitations that protect the Court's legitimacy).

24. George & Guthrie, *supra* note 1, at 1464.

25. SCOTUSBlog, October Term 2006: Summary Information Regarding the Term, <http://www.scotusblog.com/movabletype/archives/OT06SummaryInfo.pdf> (last visited Feb. 20, 2009).

26. George & Guthrie, *supra* note 1, at 1472.

27. *Id.*

concern. There is no way to know whether these courts that sit in panels would have even more legitimacy if they sat en banc. Also, the authors fail to recognize the loss of legitimacy in shifting from a Court that for over two hundred years acted only en banc to one that sits in panels.

Professors George and Guthrie offer another solution: the possibility of en banc review by the Supreme Court. But they find themselves in a dilemma. On the one hand, if en banc review were rare and limited, then it could not solve the loss of legitimacy that would result from the vast majority of cases being decided by panels. On the other hand, if en banc review were frequent, then increasing the size of the Court and having panels would achieve little increase in the size of the docket and none of the benefits claimed by Professors George and Guthrie.²⁸

CONCLUSION

This Symposium includes many wonderful papers on empirical research about judicial behavior. All describe aspects of how courts actually operate. But a cautionary note is necessary; there is a need to always carefully separate discussions of what “is” from what “ought to be.” Descriptions, even with the most sophisticated techniques, do not provide normative conclusions (though they can be the basis for normative analysis). Things can be measured—the size of the docket, the number of cases decided, the rate of agreement among judges, citation counts—but that does not necessarily mean that these measurements reveal anything useful and the descriptions are not normative in themselves.

Yet it is so easy for the descriptive to slip into the normative. The paper by Professors Choi, Gulati, and Posner, published in this Symposium, illustrates this point.²⁹ They rank state court judges using three criteria—opinions produced, rate of disagreement with other judges of their party, and citation count. They label these counts

28. The very existence of the en banc procedure would take additional Court time and limit the additional capacity to hear more cases. It has to be assumed that litigants losing before a panel would frequently petition for en banc review. Scrutinizing these petitions would take time as would the en banc hearings and opinions. The more en banc proceedings there would be, the less there would be capacity for a larger docket.

29. Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313 (2009).

“productivity,” “independence,” and “influence.” These terms have enormous normative content far beyond just calling the measures “opinions produced,” “rate of disagreement with judges of the same political party,” and “citation count.” Every judge wants to be deemed productive, independent, and influential.

Yet Professors Choi, Gulati, and Posner never defend their assessment in normative terms. Why should the number of opinions produced be seen as a measure of productivity rather than a function of the size of the docket and the norms for that court? A conservative Democrat or a liberal Republican might vote consistently differently from others of the same party, but why does that make the person more independent? Why assume a citation is necessarily the same as influence?

Professors Choi, Gulati, and Posner then rank the state courts and even individual judges using these measures. We are used to rankings in everything from football polls to *U.S. News & World Report*. Rankings take on a life of their own and are seen as a measure of quality. In other words, they take statistics, attach normative labels, and do rankings, sliding from descriptions to normative conclusions and never justify doing so.

Empirical research about judging can be enormously valuable if it provides important insights into courts and judicial behavior. But empirical research can do great harm if it is assumed that something matters just because it can be measured and if it is allowed to substitute for careful normative analysis and arguments.